SUPREME COURT, U. S.

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JOHN F. DAVIS, CL

# in the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1087

BRUCE KOZEROWITZ,

*Appellant,*

*vs.*

A. J. STACK and the FLORIDA REAL ESTATE COMMISSION,

*Appellees.*

On Appeal from the Supreme Court of Florida

## JURISDICTIONAL STATEMENT

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MIAMI REVIEW — 371-4853 — 377-3721

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## JURISDICTIONAL STATEMENT

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Appellant appeals from the Judgment of the Supreme Court of Florida entered on October 20, 1969, affirming an Opinion of the District Court of Appeal of Florida, Third District, and he submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW

The Opinion of the Supreme Court of Florida herein appealed from is reported in 226 So.2 682. A prior decision in the case by the District Court of Appeal of Florida, Third District, is reported in 219 So.2 469. The decision of the Florida Real Estate Commission giving rise to the District Court of Appeal's decision is not reported. Copies of the Opinion of the Supreme Court of Florida here sought to be reviewed and the unreported Order of the Florida Real Estate Commission giving rise to this case are attached hereto as Appendices A and B, respectively.

## JURISDICTION

The proceeding below was commenced under chapter 475 Florida Statutes 1969 by the Florida Real Estate Commission, hereinafter called the Commission, a state agency. The object of the proceeding is to revoke your Appellant's license as a registered real estate broker in the state of Florida through an administrative proceeding before the Commission. After Appellant's Motions to Quash filed before the Commission were denied by the Order set out in Appendix A hereto, he took certiorari to the District Court of Appeal of Florida, Third District, which rendered an Opinion and certified the case to the Supreme Court of Florida as one involving a question of great public interest. The Supreme Court of Florida took jurisdiction and entered the decision and Opinion here appealed from. The decision sought to be reviewed here was entered and rendered October 20, 1969, the date when a timely Petition for Rehearing filed by your Appellant and directed to Florida Supreme Court's Opinion of September 17, 1969 was denied. Notice of Appeal to this Court was filed in the Supreme Court of Florida on De-

cember 17, 1969. The jurisdiction of the United States Supreme Court to review by direct appeal the decision of the Florida Supreme Court is conferred by Title 28 United States Code, sec. 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the Judgment on direct appeal in this case: *Standard Oil Co. vs. Johnson*, 316 U.S. 481 (1941); *Western Turf Assoc. vs. Greenberg*, 204 U.S. 359 (1906) and *Charleston Federal vs. Alderson*, 324 U.S. 182 (1944).

## STATUTES INVOLVED

This case draws into question the validity of F.S. 475.27 and F.S. 475.30(1). The texts of those statutes are:

> "475.27 Whenever an issue of material fact shall appear from the information and answer in a denial, revocation or suspension proceeding, the commission, or its chairman, shall make an order appointing an examiner to hear and report the evidence that may be offered upon said issue. The examiner shall receive the evidence offered together with any objections thereto and shall transcribe or cause to be transcribed the same and shall report the testimony to the commission. The parties shall have reasonable opportunity to present all evidence pertinent to any material issue in the case. The examiner shall administer oaths to the witnesses, afford all parties the right to cross-examine adverse witnesses, give notices of the time and place of hearing, and do any other act authorized by this chapter, or lawfully directed by the commission. The examiner may, unless the commission or chairman shall otherwise direct, make a presentment to the circuit court of the county in which the hear-

ing is or was held, of any misconduct of a witness, described in §475.32, for proceedings therein authorized, or the commission or chairman, may make such presentment. Unless an examiner or reporter is a regular salaried employee of the commission, he may be paid a per diem for holding hearings and such compensation for transcribing and reporting testimony, as may be deemed reasonable by the commission. An examiner may adjourn hearings, but all hearings shall be held in the county where the defendant resides or where the matters and things charged in the information are alleged to have occurred.

475.30(1) The defendant named in an information shall file with the commission a verified answer thereto, and, if he be so advised, a motion to quash the information, on or before the date fixed in the notice required by §475.26. The filing of an answer to the information shall waive any defect in, or objection to, the notice, or want of notice. The answer shall admit or deny each fact alleged, except mere matters of inducement, or formal allegations, in the information, or avoid the effect thereof by a recital of the facts as defendant conceives them to be, and each issuable fact not denied in one of the manners aforesaid, shall be deemed to be admitted. No admission or allegation of the defendant made in an answer, motion or on the trial, shall be evidence against him in any civil or criminal proceeding, except upon a trial of a charge of perjury against him. All allegations of an answer not admitted in the information shall be deemed denied by the plaintiff."

## QUESTIONS PRESENTED

The following questions are presented for review here:

I

DOES IT VIOLATE APPELLANT'S RIGHTS UNDER AMENDMENTS V AND XIV TO THE UNITED STATES CONSTITUTION TO REQUIRE HIM TO DENY UNDER OATH CHARGES BROUGHT AGAINST HIM BY THE STATE IN A PENAL PROCEEDING TO REVOKE HIS REAL ESTATE BROKER'S LICENSE OR ELSE ADMIT ANY FACT PLED BY THE STATE WHICH HE DOES NOT SO DENY?

II

IS APPELLANT ENTITLED UNDER THE PROVISIONS OF AMENDMENTS V, VI, VII and XIV TO THE CONSTITUTION OF THE UNITED STATES TO A TRIAL BY JURY IN A PENAL PROCEEDING BROUGHT AGAINST HIM BY THE STATE TO REVOKE HIS REAL ESTATE LICENSE?

III

A THIRD QUESTION PRESENTED BY THIS CASE AS TO WHICH CERTIORARI REVIEW IS SOUGHT UNDER THE PROVISIONS OF 28 USC 1257 (3) IS:

> IS APPELLANT ENTITLED TO HAVE EACH JUSTICE OF THE HIGHEST COURT OF A STATE WHO JOINS IN AN OPINION AS TO HIS CONSTITUTIONAL RIGHTS BE PRESENT AT AND HEAR ORAL ARGUMENT IN THE CASE, OR CAN THE CASE BE RULED ON BY SOME JUSTICES WHO DO NOT HEAR ARGUMENT?

## STATEMENT OF THE CASE

Appellant, Bruce Kozerowitz, is a real estate broker in the state of Florida, licensed by the Florida Real Estate Commission, a state agency operating and existing under the Florida Real Estate License Law, ch. 475, Florida Statutes, 1969. It is unlawful under provisions of that law to operate as a broker in Florida unless licensed by the Commission.

On October 15, 1967, Appellant was made the Defendant in an Information in three counts filed before the Commission by an employee thereof seeking revocation of Appellant's broker's license. The first count has been quashed by Florida courts.

The second and third counts were upheld below. In those counts, Appellant is charged with selling real estate to customers after expiration of his annual certificate in 1966 and obtaining his new certificate thereafter by falsely asserting in his application that he had not so sold real estate since the last annual certificate expired.

Appellant was required under the provisions of Florida Statute 475.30 (1) quoted above to file an answer *under oath* denying the allegations of the Information against him or to admit the truth of any allegation against him not so denied under oath.

As is further apparent from the provisions of Florida Statute 475.27 quoted above, any issue of fact developed in the case would be treated by taking testimony before a hearing examiner, upon which the commission would then pass. This is the only method of trying the facts and taking testimony permitted.

Appellant filed with the Commission his Motions to Quash the Information, asserting the impropriety under Federal Constitutional provisions of the requirement that he file a sworn answer or admit the facts of the case and also asserting his right under the Federal Constitution to a jury trial of the issues in the case since the state was seeking to impose a penalty on him by revoking his license and taking away his right to earn a living in his business. The Motions were denied by the Commission. Appellant then took certiorari from the denial to the District Court of Appeal raising both of those issues and the Federal questions therein in his petition. The District Court denied Appellant relief on these issues and Appellant took certiorari to the Supreme Court of Florida, which is the highest Court of the state, preserving the Federal questions in his petition.

The Supreme Court set the case for oral argument and after hearing argument rendered the Opinion giving rise to this appeal, in which the "majority" sustained the validity of the state statutes in question over Appellant's contention that the statutes violated his rights under the United States Constitution. A dissent by two justices held that Florida Statute 475.30(1) impaired Appellant's Federal Constitutional rights as interpreted in *Spevack vs. Klein*, 385 U.S. 511 (1967).

In his Petition for Rehearing, directed to the decision here appealed from, the Appellant pointed out that the decision here appealed from went against him by a 5 to 2 vote, viz:

For the majority:

Mr. Justice Boyd

Mr. Justice Drew

Mr. Justice Thornal

Mr. Justice Carlton

Mr. Justice Adkins

For the minority:

Mr. Chief Justice Ervin

Mr. Justice Roberts

The Petition for Rehearing calls to the Court's attention that only five Justices heard oral argument in the case, viz:

Mr. Justice Boyd

Mr. Justice Drew

Mr. Justice Adkins

Mr. Justice Roberts

Mr. Chief Justice Ervin

Thus, two members of the majority, Justices Thornal and Carlton voted without hearing argument. Without these votes, the Court was split 3 to 2. The Constitution of the state of Florida provides, Article V, sec. 4(1):

> "Section 4. Supreme Court. — (1) Organization. The Supreme Court shall consist of seven members, one of whom shall be the Chief Justice. Five Justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision."

Obviously those who heard argument could only muster three votes for the majority, and the constitutional deadlock was resolved by submitting the case to two Justices who did not hear oral argument. The Petition for Rehearing attacked this procedure as a deprivation of due process and the right to be heard. It was denied.

## THE QUESTIONS ARE SUBSTANTIAL

### I

The first question is whether the state in a penal proceeding can require an accused to deny the allegations of state's accusatory pleading under oath or else admit the truth of them over his claim that his Federal constitutional privilege under the Fifth Amendment entitles him to remain silent and place the state upon its proof as to every material allegation thereof. Appellant does not and will not contend that the state cannot require him to plead in some manner so as to place the case at issue such as pleading "not guilty"; but Appellant contends that requiring him to testify under oath in his Answer or admit the truth of any allegation which the state cares to make in its unsworn accusatory pleading makes it "costly" for him to invoke his privilege against self-incrimination by denying him the right to a trial on issues of fact unless and until he so testifies through his Answer. It should be noted that the legislature of the state of Florida in enacting the statute in question, Florida Statute 475.30(1), itself recognized the incriminatory nature of this requirement by attempting in the next to last sentence of the statute to grant an immunity to one answering under oath. Appellant has steadfastly contended at every stage of the

proceedings that this immunity is invalid under this Court's holding in *Counselman v. Hitchcock*, 142 U. S. 547 (1890). The provisions of the Florida Real Estate License Law. Ch. 475 Florida Statutes make the offenses with which Appellant is charged a misdemeanor as well as providing for the penal forfeiture of his license which is sought in the case at bar. If the decision of the Florida Supreme Court that the statute in question is valid is allowed to stand, over Appellants claim of Federal Constitutional privileges, the value of Appellant's Fifth Amendment privilege and the worth of *Spevack v. Klein*, 385 U. S. 511 (1967) and *Garrity v. New Jersey*, 385 U. S. 493 (1967) upon which Appellant has relied at every stage of these preceedings may be totally nullified by any state or administrative body simply by passing a statute or enacting a rule similar to the Florida Statute at bar and requiring any person who is a member of a licensed profession or trade to answer an accusatory pleading against him under oath or forfeit his right to earn a living. The decision of this question has implications which will thus affect both criminal and administrative procedure in every state in the union.

## II

This Court has extended the right to trial by jury to criminal cases involving "serious" penalties for the infraction of penal statutes and has interpreted "serious" to mean a situation which could result in an imprisonment for 6 months or more. *Cheff vs. Schnackenberg*, 384 U.S. 373 (1966); *Duncan v. Louisiana*, 391 U.S. 145 (1968). This case brings to this Court the question of whether the imposition of a penal forfeiture of a license to practice a lawful trade, which involves the assessment of a penalty

by the state, is of such a nature as to require a trial by jury. The state of Florida currently regulates by statute at least 35 businesses and professions, excluding attorneys-at-law, and requires the licensing of practitioners thereof. Other states have similar regulatory statutes. The number of businesses, trades and professions being regulated grows every year. The revocation of a license to operate in one's business or profession is a species of economic death sentence to the person whose license is revoked. He is, in many ways, in a far worse position than the convicted felon who can at least look forward to the possibility of pardon or similar rehabilitation, since in most cases there are no provisions in the business regulatory statutes for the rehabilitation of one who has had his license revoked. In addition, the revocation of a license in one state and in one vocation operates as a bar to being licensed in other states or in other vocations since virtually all applications for licensing require the applicant to state whether he has ever had a license revoked and the revocation can be used as a ground to deny him a license in another state or another vocation. Appellant's position is that his right of trial by jury should enure to him when the state seeks to impose a penalty on him, whether by imprisonment or fine, or the taking away of his license to conduct his business, since whatever the label applied, the end in view is punitive.

## III

In the case at bar, the highest court of the state of Florida was deciding a question certified to it as one of great public importance to the people of this state. The Supreme Court of Florida heard oral argument on the case. Notwithstanding that fact, the case was disposed

of by a Constitutional majority including two Justices who were not present at the oral argument and did not participate therein. If oral argument is a vital part of the judicial process and of due process then Appellant submits that a litigant is entitled as a matter of right to have each of the majority of justices who decides his case participate and be present at the oral argument thereof. The case at bar is clearly distinguishable from *Wagner Electric Manufacturing Co. v. Lyndon*, 262 U. S. 226 (1922), since in that case 3 of the 4 justices concurring in a unanimous decision of the Missouri Supreme Court were present at argument and the case was thus decided by a clear majority of justices who attended. In the instant case, the requisite constitutional majority could not have been formed without a justice who did not hear oral argument.

It is submitted that the decision appealed from upholds the validity of the state statutes in question against the claim of Appellant maintained throughout this proceeding that those statutes violate his rights under the Constitution of the United States and further the method of decision in the Supreme Court of Florida impinges upon the Appellant's right to due process and that the questions presented are of substantial public interest and importance both to the people of the state of Florida and to the citizens of the other states.

Respectfully submitted,

Shalle Stephen Fine
1237 City National Bank Building
Miami, Florida

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Jurisdictional Statement was mailed to Thomas Henkel, Jr., Esq., Florida Real Estate Commission, West Morse Boulevard, Winter Park, Florida, attorney for appellees this 16 day of January, 1970.

Shalle Stephen Fine

## APPENDIX A

**Case No. 38,428**

IN THE SUPREME COURT OF FLORIDA
JULY TERM A.D. 1969

BRUCE KOZEROWITZ,

*Petitioner,*

*-vs-*

A. J. STACK and the FLORIDA REAL ESTATE COMMISSION,

*Respondents.*

Opinion filed September 17, 1969

Writ of Certiorari to the District Court of Appeal, Third District

Shalle Stephen Fine, for Petitioner

Frank A. Wilkinson and Thomas M. Henkel, Jr., for Respondents

BOYD, J.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Third District reported at 219 So.2d 469. That decision has been certified by the District Court as passing on a question of great public interest, to wit:

> "[W]hether, in a proceeding brought under Chapter 475 F.S. by the Florida Real Estate Commission for license revocation or suspension, the

> requirement of § 475.30 (1) that in order to defend by motion to quash or on the merits the defendant must file a sworn answer to the commissions' (sic) charges, is in violation of the defendant's constitutional rights against self-incrimination."

The Florida Real Estate Commission filed a three count information against petitioner in a proceeding for license revocation or suspension. Petitioner's motion to quash the information was denied by the Board and petitioner sought certiorari in the District Court.

The District Court held Count I materially defective. This holding is not questioned.

Count Two charged petitioner violated F. S. §475.25(1)(d), by operating as a real estate salesman during the period between the expiration of his annual certificate on September 30, 1966, and the time he applied for renewal on February 1, 1967.

Count Three charged a violation of §475.25(2), alleging issuance of petitioner's renewal certificate was obtained by fraud in that on his application for renewal made on February 1, 1967, contrary to fact, he denied that he had operated as a real estate salesman during the expiration period involved.

The District Court held that the Board ruled correctly in denying the motion to quash Counts Two and Three of the information. These Counts were held sufficient.

The District Court, citing *Robbins v. Florida Real Estate Commission*,[1] rejected petitioner's contention that the requirement of F.S. §475.30(1)[2], that one charged with violation of the Act file a sworn or verified answer, violates his constitutional privilege against self-incrimination. The contention that one charged before the Board is entitled to a jury trial, was also found to be without merit.

We have considered the records, briefs and argument of counsel and find the decision of the District Court to be correct.

Accordingly, the writ is discharged.

It is so ordered.

DREW, THORNAL, CARLTON and ADKINS, JJ., concur

ERVIN, C. J., dissents with Opinion

ROBERTS, J., dissents and agrees with ERVIN, C. J.

ERVIN, C. J., dissenting:

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[1] 162 So.2d 535 (Fla. App. 3rd 1964).

[2] "475.30 Answers, motions and defaults.— (1) the defendant named in an information shall file with the commission a verified answer thereto, and, if he be so advised, a motion to quash the information, on or before the date fixed in the notice required by §475.26. The filing of an answer to the information shall waive any defect in, or objection to, the notice, or want of notice. *The answer shall admit or deny each fact alleged*, except mere matters of inducement, or formal allegations, in the information, or avoid the effect thereof by a recital of the facts as defendant conceives them to be, and each issuable fact not denied in one of the manners aforesaid, shall be deemed to be admitted. *No admission or allegation of the defendant made in an answer, motion or on the trial, shall be evidence against him in any civil or criminal proceeding, except upon a trial of a charge of perjury against him.* All allegations of an answer not admitted in the information shall be deemed denied by the plaintiff." (e.s.)

I would answer the question certified to us in the affirmative. So far as Section 475.30(1), F. S., operates to subject Petitioner, in a license revocation proceeding, to a forfeiture of the right to defend charges brought by the Commission as a means of compelling Petitioner to relinquish his privileges against self-incrimination, such procedure places an intolerable burden or penalty on the assertion of the Fifth Amendment privilege according to its interpretation by the Supreme Court of the United States. See plurality opinion in Spevack v. Klein (1967), 385 U. S. 511. The underlying rationale of the District Court of Appeal, Third District, in Robbins v. Florida Real Estate Commission, 162 So.2d 535, to the effect the right against self-incrimination does not apply to non-criminal proceedings is clearly inconsistent with pronouncements in Spevack that the privilege secured by the Fifth and Fourteenth Amendments embraces the right of a person to remain silent in a case of this kind where his economic and professional status as a licensee is placed in jeopardy, unless he chooses to speak, and to suffer no "penalty" for exercising such right. The plurality opinion in Spevack interprets "penalty" as not restricted to fine or imprisonment but rather; extending to "the imposition of any sanction which makes assertion of the Fifth Amendment privilege 'costly.'" Spevack, supra, at 515. I believe the procedure authorized by Section 475.30(1), F.S., falls within the proscriptions set out in Spevack.

ROBERTS, J., concurs

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## APPENDIX B

FLORIDA REAL ESTATE COMMISSION
PROGRESS DOCKET

**No. 1752**

DADE COUNTY

A. J. STACK,

*Plaintiff,*

*vs.*

BRUCE KOZEROWITZ, a/k/a BRUCE KAYE, and DYNAMIC DEVELOPMENT CORP.,

*Defendants.*

Filed 18th day of December, 1967;

FLORIDA REAL ESTATE COMMISSION

K. EVANS

### ORDER

At a regular meeting of the Florida Real Estate Commission held at the Executive Headquarters in Winter Park, Florida, on December 11, 1967,

Present: James E. Churchwell, Acting Chairman
Walter B. Decker, Member

Appearances: Thomas M. Henkel, Jr.
Attorney for Plaintiff

Shalle Stephen Fine
Attorney for Defendants

This matter came on for consideration of the Motions to Quash the Information filed by the defendants, Bruce Kozerowitz a/k/a Bruce Kaye and Dynamic Development Corp., and of the Motion for Final Order filed by the plaintiff as to defendant Bruce Kozerowitz a/k/a Bruce Kaye, and after argument of counsel for the plaintiff and defendants and upon due consideration of the motions and arguments,

IT IS ORDERED that the Motions to Quash be, and they are both hereby, DENIED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Final Order be, and the same is hereby, DENIED.

DONE and ORDERED at Winter Park, Florida, this 18th day of December, 1967.

/s/ JAMES E. CHURCHWELL

Acting Chairman